FILED
NOV 18 1994
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No. 94-402

In the Supreme Court of the United States

OCTOBER TERM, 1994

JOSEPH PINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether the use of a Forward Looking Infrared Device (FLIR) to detect the intensity of heat emanating from petitioner's residence constituted an unreasonable search in violation of the Fourth Amendment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 24 F.3d 1056.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1994. A petition for rehearing was denied on June 21, 1994. Pet. App. A17. The petition for a writ of certiorari was filed on August 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of manufacturing marijuana, in violation of 21 U.S.C. 841(a)(1). Pet. App. A1. He was sentenced to 60 months' imprisonment, to be followed by four years of supervised release. *Id.* at A9-A16.

1. In June 1991, law enforcement officers began an investigation of petitioner after learning that he had received three packages from companies that supplied hydroponic growing equipment, which is often used to grow marijuana indoors. The companies were known to advertise the equipment in a magazine that promotes the cultivation and use of marijuana. The officers also learned from electrical utility records that petitioner's residence had an unusually high electrical usage, which was consistent with the high amount of electricity needed to power the lights, pumps, timers, fans, and other equipment used to grow marijuana indoors. Pet. App. A2; Gov't C.A. Br. 1-2, A7-A8.

Based on their past experience, the officers knew that indoor cultivation of marijuana requires high intensity discharge lights, which use 400 to 1000 watt bulbs. Such lights generate heat of 150 degrees or more. Since the optimum temperature for growing marijuana is between 68 and 72 degrees, the excess heat generated by the high intensity discharge lights must be vented in order to maintain an indoor marijuana growing operation. Pet. App. A3; Gov't C.A. Br. 2-3.

On July 25, 1991, the officers conducted aerial surveillance of petitioner's residence. A Forward Looking Infrared (FLIR) device was mounted on the underside of the officers' helicopter. The FLIR device is a thermal imaging device that detects differences

between the amounts of heat emitted from various surfaces. The differences in surface temperature are displayed on a monitor as shades ranging from black or dark grey when an object emits little heat to white when an object emits intense heat. The FLIR showed that the roof, skylight, and a covered window of petitioner's residence emitted an excessive amount of heat in comparison to the surrounding houses. Pet. App. A2-A3; Gov't C.A. Br. 3-4.

Shortly thereafter, the officers obtained a search warrant for petitioner's residence. When they executed the warrant, the officers found an indoor marijuana growing operation on the third floor or attic of the residence. The officers seized over 100 marijuana plants, processed marijuana, cash, miscellaneous growing equipment, and magazines and books concerning marijuana cultivation. Pet. App. A2; Gov't C.A. Br. 4-5.

2. Petitioner filed a motion to suppress the evidence seized pursuant to the search warrant. He argued that the aerial FLIR surveillance of his residence constituted an illegal search under the Fourth Amendment. He further argued that the affidavit supporting the search warrant lacked probable cause in the absence of the results of the FLIR surveillance. The district court denied the motion. Pet. 3; Gov't C.A. Br. B1-B12.

3. The court of appeals affirmed. Pet. App. A1-A7. It held that use of the FLIR device did not constitute a search under the Fourth Amendment because petitioner did not have a legitimate expectation of privacy in the heat emitted from his residence. *Id.* at A3-A5. The court explained that "[a]n expectation of privacy is only reasonable where (1) the individual manifests a subjective expectation of privacy in the object of the challenged search; and (2) society is willing to recognize that subjective expectation as reasonable." *Id.* at A3 (citing

Katz v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). The court found that "the use of the FLIR device is analogous to the detection of odors emanating from luggage or the search of garbage left outside for collection." Pet. App. A5. In addition, the court noted that "[t]he detection of the heat waste was not an intrusion into the home; no intimate details of the home were observed, and there was no intrusion upon the privacy of the individuals within." *Ibid.* The court thus concluded that "[n]one of the interests which form the basis for the need for protection of a residence, namely the intimacy, personal autonomy and privacy associated with a home, are threatened by thermal imagery." *Ibid.* The court therefore ruled that "[a]ny subjective expectation of privacy [petitioner] may have had in the heat radiated from his house is not one that society is prepared to recognize as 'reasonable.'" *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 4-10) that the court of appeals erred in holding that the use of the FLIR device during the aerial surveillance of his residence did not constitute an unreasonable search under the Fourth Amendment. That claim lacks merit.

This Court employs a two-part test to determine whether an individual has a constitutionally protected expectation of privacy in an object or location: "first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" *California* v. *Ciraolo*, 476 U.S. 207, 211 (1986); see also *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). In *Ciraolo*, the Court held that a police overflight of a private residence did not require a warrant. The Court concluded that an

individual had no reasonable expectation of privacy in an area (the backyard of his home) that was visible to the naked eye from an aircraft in navigable airspace. 476 U.S. at 212-214; see also *Florida* v. *Riley*, 488 U.S. 445, 449-452 (1989) (plurality opinion). In *Dow Chemical Co.* v. *United States*, 476 U.S. 227, 234-239 (1986), the Court similarly held that the use of an aerial mapping camera to photograph an industrial manufacturing complex from navigable airspace did not require a warrant.

In this case, the court of appeals properly concluded that petitioner had no legitimate expectation of privacy in the level of heat emitted from his residence. As the court of appeals correctly explained, "[t]he detection of the heat waste was not an intrusion into the home; no intimate details of the home were observed, and there was no intrusion upon the privacy of the individuals within." Pet. App. A5. Because "[n]one of the interests which form the basis for the need for protection of a residence, namely the intimacy, personal autonomy and privacy associated with a home, are threatened by thermal imagery[,]" the court of appeals correctly concluded that "[a]ny subjective expectation of privacy [petitioner] may have had in the heat radiated from his house is not one that society is prepared to recognize as 'reasonable.'" *Ibid.*

In *Dow Chemical*, this Court acknowledged that "surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant." 476 U.S. at 238. The Court went on to explain, however, that

> the photographs here are not so revealing of intimate details as to raise constitutional concerns. Although

> they undoubtedly give EPA more detailed information than naked-eye views, they remain limited to an outline of the facility's buildings and equipment. The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems. An electronic device to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other trade secrets would raise very different and far more serious questions.

476 U.S. at 238-239. The Court thus focused on the potential of a particular surveillance technique to reveal information that is genuinely private.

Although petitioner asserts (Pet. 5) that the FLIR device produces what amounts to an x-ray photograph, the thermal imaging technique is more nearly comparable to conventional photography. While conventional photography records the image of an object based on the object's emission of radiation from the visible portion of the electromagnetic spectrum, thermal imaging simply records images based on the object's emissions from the infrared portion of the electromagnetic spectrum. Quite unlike x-ray photography, thermal imaging merely produces a picture of the surface temperature of the exterior of an object—such as the roof and outside walls of petitioner's residence—based on the radiation that object emits.[1] Thus, the picture produced by thermal

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[1] At the suppression hearing, the Drug Enforcement Agency (DEA) agent who conducted the surveillance testified that the FLIR device indicated that petitioner's residence was emitting an excessive amount of heat because, when viewed on the monitor, areas of petitioner's residence appeared white while the roofs of the surrounding houses appeared black. Gov't C.A. Br. 3-4. Because the information obtained by the FLIR device is derived

imaging is no more intrusive than the enhanced aerial photographs that were limited to an outline of the buildings in *Dow Chemical*. Because the FLIR device did not penetrate the walls or otherwise reveal what was occurring within the residence, its use did not "infringe[] upon the personal and societal values protected by the Fourth Amendment." *Ciraolo*, 476 U.S. at 212.[2] The court of appeals therefore correctly held that "[a]ny subjective expectation of privacy [petitioner] may have had in the heat radiated from his house is not one that society is prepared to recognize as 'reasonable.'" Pet. App. A5.

2. The court of appeals' decision is consistent with that of the only other court of appeals that has squarely addressed the issue. Like the court of appeals here, the Eleventh Circuit in *United States* v. *Ford*, 34 F.3d 992, 995-997 (1994), held that the use of a thermal imaging device to detect heat emanating from a mobile home did not constitute an unreasonable search. The court explained that "[l]ike the aerial photography in *Dow*, the thermal imagery at issue here appears to be of such low resolution as to render it incapable of revealing the

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from exterior images of a building (or other object), petitioner's reliance (Pet. 9-10) on *United States* v. *Karo*, 468 U.S. 705 (1984), is misplaced. That case involved monitoring of a beeper inside a residence, "a location not open to visual surveillance." *Id.* at 714.

[2] Indeed, the use of the FLIR device in this case was no more intrusive than the warrantless use of a trained drug detection dog to sniff luggage in a public place that was upheld in *United States* v. *Place*, 462 U.S. 696, 707 (1983). As the court of appeals observed, "[j]ust as odor escapes a compartment or building and is detected by the sense-enhancing instrument of a canine sniff, so also does heat escape a home and is detected by the sense-enhancing infrared camera." Pet. App. A5.

intimacy of detail and activity protected by the Fourth Amendment." 34 F.3d at 996.

In *United States* v. *Kyllo*, No. 93-30231 (Oct. 4, 1994), slip op. 12,076-12,077, aff'g in part and remanding 809 F. Supp. 787 (D. Or. 1992), the Ninth Circuit recently found that the record was insufficiently developed to determine whether the use of a thermal imaging device to scan the defendant's residence constituted a search. The Ninth Circuit remanded for an evidentiary hearing on the technological capacities of the thermal imaging device used in that case. That decision thus does not constitute a definitive holding on the question presented here. There is, therefore, no conflict that would warrant this Court's review.[3]

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[3] The majority of district courts to consider the issue have held that the warrantless use of a thermal imaging device does not constitute an unreasonable search. See *United States* v. *Domitrovich*, 852 F. Supp. 1460, 1472-1475 (E.D. Wash. 1994); *United States* v. *Porco*, 842 F. Supp. 1393, 1395-1398 (D. Wyo. 1994); *United States* v. *Penny-Feeney*, 773 F. Supp. 220, 225-228 (D. Haw. 1991), aff'd on other grounds *sub nom. United States* v. *Feeney*, 984 F.2d 1053 (9th Cir. 1993). Two district courts have reached a contrary conclusion. See *United States* v. *Field*, 855 F. Supp. 1518, 1525-1533 (W.D. Wis. 1994); *United States* v. *Ishmael*, 843 F. Supp. 205, 209-213 (E.D. Tex. 1994). We note that the government's appeal of the district court's ruling in *Ishmael* is pending.

As petitioner points out (Pet. 7-8), the Washington Supreme Court held in *State* v. *Young*, 867 P.2d 593, 595-601 (1994), that the use of a thermal imaging device to detect heat radiated from the defendant's home violated the state constitution. The court went on to conclude that the use of the thermal imaging device also violated the Fourth Amendment. 867 P.2d at 601-604. The court acknowledged, however, that it "need not reach the issue of whether infrared surveillance of defendant's home violates the [Fourth Amendment] since we find that it violates [the state constitution]." *Id.* at 601. Thus, the court's discussion of the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1994

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federal constitutional question was dicta. Compare *State* v. *McKee*, 510 N.W.2d 807 (Wis. Ct. App. 1993) (holding that use of thermal imager to scan the defendant's home did not violate the Fourth Amendment), review denied, 515 N.W.2d 715 (Wis. 1994) (Table).